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In The Supreme Court of the United States

October Term 1998

KENTUCKY RIGHT TO LIFE, INC., et al.,
Petitioners,

v.

DAVID STENGEL, as Commonwealth Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth Attorneys in the State of Kentucky, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS DEALT WITH HEREIN

1. Where a plaintiff alleges an intention to engage in First Amendment activity, which a challenged non-moribund statute arguably proscribes and whose enforcement has not been previously disavowed, is the existence of the statute sufficient to cause an Article III injury for the purpose of determining if the plaintiff benefited by legislative amendments that mooted the constitutional challenge?

2. Where a plaintiff alleges an intention to engage in First Amendment activity, which a challenged non-moribund statute arguably proscribes and whose enforcement has not been previously disavowed, is a credible threat of prosecution presumed absent compelling contrary evidence?

   A. Is a plaintiff's litigation position--that a defendant's voluntary cessation of challenged conduct (i.e., repeal of/ amendments to challenged statutes) does not deprive the federal court of jurisdiction to determine the constitutionality of the challenged statutes--compelling contrary evidence of a presumed credible threat of prosecution?

   B. Is the rejection of an administrative agency's offer to provide an *ultra vires* advisory opinion concerning the reach of challenged statutes compelling contrary evidence of a presumed credible threat of prosecution?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kentucky Right To Life, Inc., Kentucky Right To Life Political Action Committee, Robert Zoeller and Lora Robertson, request a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The unreported order of the court of appeals affirming the judgment of the district court denying petitioners an award of attorneys' fees is reproduced in the Appendix ("App.") filed herewith at App. 1. The opinion of the court of appeals affirming the district court's denial in part of Petitioners' Motion for Preliminary Injunction is reported at 108 F.3d 637 (6th Cir. 1997) and is reproduced at App. 9.

STATEMENT OF JURISDICTION

The court of appeals filed its decision affirming the district court's denial of attorneys' fees on January 8, 1999. App. 1 Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First and Fourteenth Amendments to the United States Constitution, this case involves the Civil Rights Attorney's Fees Act of 1976 as set forth in Title 42 U.S.C. § 1988, which provides in relevant part:

> In any action or proceeding to enforce a provision of section . . . 1983 . . ., the court, in

> its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This petition concerns the denial of attorneys' fees under 42 U.S.C. § 1988. The court of appeals held that, even though plaintiffs-petitioners' suit appeared to be the direct cause of legislative amendments mooting their constitutional challenge, petitioners did not benefit from the amendments because there was never a credible threat of prosecution. The court reached this conclusion because the (1) State had never enforced the challenged statutes against petitioners and had taken the litigation position that it did not intend to enforce the statutes as the plain terms allowed; and (2) because of petitioners' (a) litigation position that the court retained appellate jurisdiction (after the amendments had been adopted) to decided the constitutionality of the former statutes; and (b) litigation strategy not to accept the State's offer to issue an *ultra vires* advisory opinion, if so requested, limiting the reach of the challenged statutes.

This decision, along with a recent Eleventh Circuit opinion, are departures from the established rule of this Court and several circuits, which hold that where a plaintiff alleges an intent to engage in First Amendment activity, which is proscribed by statute and there is a credible threat of prosecution, such plaintiff has Article III standing. In such cases, the existence of the statute is the source of the injury and a credible threat of prosecution is to be presumed absent compelling contrary evidence.

A. Facts

Petitioner Kentucky Right To Life, Inc. ("KRL") is a non-profit membership corporation, incorporated in Kentucky, with local chapters throughout the State. Its

purposes are to educate the public on issues relating to abortion, to restore protection of the right to life for unborn children, and to promote the sanctity of all innocent human life. KRL intended to engage in issue advocacy regarding candidates and make independent expenditures during the 1995 elections but was deterred because of the statutes at issue.

KRL has established a separate, internal PAC, Petitioner Kentucky Right To Life Political Action Committee ("KRLPAC"). KRLPAC intended to make political contributions to state candidates for statewide and legislative offices, to make independent expenditures for and against such candidates, and to engage in issue advocacy, during the 1995 elections but was deterred because of the statutes at issue.

Petitioner Lora Robertson is the Treasurer of KRLPAC. Petitioner Robert Zoeller is a resident of the State of Kentucky who had intended to contribute to KRL and KRLPAC during the 1995 election but for the statutes at issue.

B. Proceedings Below

On August 22, 1995, petitioners filed a Verified Complaint for declaratory and injunctive relief challenging several of Kentucky's election laws.[1] Petitioners also

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[1] Petitioners challenged the following statutes:

(1) Ky. Rev. Stat. Ann. § 121.025 (App. 58), alleging that its prohibition on corporate contributions prohibited KRL, a "[v]oluntary political association" that "do[es] not pose th[e] danger of corruption," from making direct contributions to candidates (*see FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259, 263 (1986) ("*MCFL*") and *North Carolina Right To Life, Inc. v. Bartlett*, 1999 WL 74739 , at *7-9 (4th Cir. Feb. 17, 1999)), and that this prohibition, coupled with the definition of "contribution" in §§ 121.015(6)(e) ("any [e]xpenditure in connection with any other activity undertaken . . . made

challenged § 121.150(10)'s $1,500 aggregate contribution limit to "permanent committee" and § 121A.030(4)'s 25 percent aggregate limit on "permanent committee"

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or furnished for the purpose of influencing the results of an election") and 121A.010(11)(a)(5) (same), respectively (App. 57, 95), prohibited KRL from making both constitutionally protected independent and issue advocacy expenditures (*see MCFL*, 479 U.S. at 263 and *Buckley v. Valeo*, 424 U.S. 1, 39-51, 80 (1976));

(2) § 121.035(2) (App. 59), alleging that its prohibition on corporate employees "in any way handl[ing] any money . . . in any way for the purpose of aiding, assisting or advancing any candidate . . . in any way whatever" prevented KRL from making independent and issue advocacy expenditures;

(3) § 121.180(6)(a) (App. 82), alleging that the definition of "permanent committee" in § 121.015(3) ("a group of individuals . . . having as a primary purpose political activity which may include support of or opposition to selected candidates") required KRL to be regulated as a PAC (*see Buckley*, 424 U.S. at 79-80 and *MCFL*, 479 U.S. at 252 n.6, 262);

(4) § 121.180(6)(b) (App. 849), alleging that the 5% administrative fee on all PAC contributions and independent expenditures was a content-based burden on political speech without a compelling state interest;

(5) § 121.190(1) (App. 89), alleging that its prohibition on anonymous communications "intended for the support or defeat of candidates" prevented KRL from making constitutionally protected anonymous independent and issue advocacy expenditures (*see McIntyre v. Ohio Elections Commn.*, 115 S. Ct. 1511 (1995)); and

(6) §§ 121.150(6) and 121A.050(1) (App. 64, 96), alleging that their $500 contribution limits burdened KRL and KRLPAC's ability to make direct contributions, and that these statutes, coupled with the definitions "contribution" in §§ 121.015(6)(e) and 121A.010(11)(a)(5), respectively (App. 57, 95), and "permanent committee" in §§ 121.015(3)(c) and 121A.010(9)(c), respectively (App. 55, 93), limited KRL's ability to make both independent and issue advocacy expenditures, and direct contributions.

contributions to slates of candidates for Governor and Lieutenant Governor. The district court upheld, and the Kentucky legislature did not amend or repeal, these provisions. The jurisdiction of the district court was based upon 28 U.S.C. §§ 1331 and 1343(c), and 42 U.S.C. § 1983.

Because the 1995 elections for statewide and legislative office in Kentucky were fast approaching, and these statutes at issue reduced petitioners' abilities to participate in them, they moved the district court to preliminarily enjoin the enforcement of these statutes. The State moved for summary judgment, denying that a case or controversy existed with respect to some of petitioners' challenges.

The district court consolidated the two motions and, on November 2, 1995, ruled that the five percent tax on PAC contributions and independent expenditures in § 121.180(6)(b) was unconstitutional, and permanently enjoined its enforcement. The court, also, found that no case or controversy existed with respect to §§ 121.025, 121.035(2) and 121.180(6)(a) based on the State's litigation position that it had never enforced them, nor did it intend to, as the statute's plain terms would allow. App. 17-18). The remaining statutes were deemed to be constitutional. App. 18. Petitioners appealed.

After petitioners filed their initial appellate brief, the Kentucky legislature amended or repealed the statutory language upon which petitioners based several of their claims. App. 18. The court of appeals noted that "many of the amendments appear to be in direct response to plaintiffs' suit." (App. 18 n.14). While the chronology of events could have led to this conclusion, *see Payne v. Bd. of Educ., Cleveland City Schs.*, 88 F.3d 392, 399 (6th Cir. 1996) ("[C]hronological evidence is one factor that may be considered in determining whether a party's lawsuit had a catalytic effect with regard to an allegedly beneficial outcome."), the court may also have had in mind that the defendants Registry of Election Finance recommended to the

Kentucky legislature all but one of the amendments in order to address most of petitioners' claims. App. 99, 141.

As a result, the circuit court dismissed these claims as moot. (App. 22-25). Petitioners argued, however, that the court retained appellate jurisdiction to decide the constitutionality of the former statutes under the "voluntary cessation" exception to the mootness doctrine. (App. 24). The court rejected this argument and, instead of vacating the district court's decision as to these claims, affirmed it. (App. 37).

Petitioners filed a petition for rehearing, which the circuit court denied, and then petitioned this Court for a *writ of certiorari*, but did not question the court of appeals' ruling that several of petitioners' challenges had been mooted by the amendments. App. 124-32. This petition was denied. 118 S. Ct. 162.

Petitioners moved the district court for attorneys' fees, which it denied because the amendments did not change the manner in which the State defendants alleged they had enforced the challenged statutes. App. 38-41. The court of appeals affirmed on the ground that the amendments did not benefit petitioners because the State had not enforced the challenged statutes against petitioners in 20 years. App. 6. The court acknowledged, however, that in the absence of a binding policy against non-enforcement, a history of non-enforcement against petitioners would not make a threat of prosecution incredible. App. 6. The court, therefore, looked to two other factors to affirm the district court.

The court of appeals found that petitioners' litigation strategy of "continu[ing] their appeal" (i.e., raising the "voluntary cessation" exception to mootness) and in filing a petition for certiorari (which did not question the court of appeals' mootness holding) was inconsistent with the normal actions of a prevailing party. App. 6. The court also relied on the fact that petitioners had failed to accept the State's offer to issue an *ultra vires* advisory opinion, which allegedly would have protected petitioners from prosecution

for conduct in which they sought to engage in the future. App. 6-8.

REASONS FOR GRANTING THE WRIT

I. Introduction

This petition concerns entitlement to attorneys' fees when legislative amendments moot a challenge to statutes that facially abridge the First Amendment. Ultimately, however, it is an Article III standing case because of the grounds upon which the court of appeals denied petitioners prevailing party status.

This petition asks the Court to conclude that the Sixth Circuit, consistent with only the Eleventh Circuit, departed from the precedents of this Court and several circuits when it decided that, even though a plaintiff alleges an intention to engage in conduct proscribed by the challenged statute: (1) statutes facially abridging First Amendment freedoms do not cause injury when the State takes a litigation position that the statutes will not be enforced according to their plain terms, and (2) a credible threat of prosecution cannot be presumed from the mere existence of an unconstitutional statute that carries with it criminal sanctions.

II. A party whose 42 U.S.C. § 1983 suit is the "catalyst" behind the defendant's voluntary action that produces some or all of the relief sought by a judgment is entitled to attorney's fees under 42 U.S.C. § 1988.

In *Hewitt v. Helms*, 482 U.S. 755 (1987), this Court reiterated that formal relief is not necessary for entitlement to attorney's fees under 42 U.S.C. § 1988 if the plaintiff can establish that his lawsuit was the "catalyst" that provoked the defendant into affording the plaintiff at least some of the relief requested:

> It is well settled, of course that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment--e.g., a monetary settlement or a *change in conduct that redresses the plaintiff's grievances*. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. [*Id.* at 760-61 (emphasis added); *see also Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("'parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief'") (citation omitted).]

More specifically, a plaintiff whose § 1983 suit has been mooted by legislative amendments must "demonstrate a clear causal link between his lawsuit and the State's amendment of its regulations." *Id.* at 763. In petitioners' initial appeal, the Sixth Circuit stated that "[i]n fact, many of the amendments [which the court found mooted several claims] appear to be in direct response to plaintiffs' suit." App. 18 n.14.

III. The Sixth Circuit departed from the decisions of this Court and other circuits holding that when a plaintiff alleges an intent to engage in First Amendment activity, which a challenged statute proscribes and whose enforcement has not been previously disavowed, the existence of the statute is the source of the injury.

On appeal from the district court's denial of petitioners' motion for attorneys' fees, the court of appeals did not revisit its prior conclusion that petitioners' suit appeared to be the direct cause of legislative amendments

mooting the case because, in the court's view, there was no actual benefit to petitioner from the amendments. It reached this conclusion by making a *post hoc* determination that there was no case or controversy before the statutes had been amended. App. 6.

The court of appeals made this decision without any reference to the text of the statutes at issue, relying instead on the fact that defendants had never enforced the challenged statutes against petitioners, as well as petitioners' litigation position and strategy. App. 6-8. In doing so, the Sixth Circuit departed from the established rule of this Court and other circuits, which have deemed the chilling effect of statutory language on a plaintiff who has alleged an intent to engage in First Amendment activity to be dispositive of standing.

This decision undercuts the reason for § 1988's existence: "to encourage litigation protecting civil rights" and "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay v. Ehrler*, 499 U.S. 432, 436 (1991); *see also Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (citation omitted). The Sixth Circuit's decision may mark the beginning of the end for pre-enforcement challenges to statutes facially abridging the First Amendment. Not so, however, if the standing jurisprudence of this Court and most circuits is reaffirmed.

In *Doe v. Bolton*, 410 U.S. 179 (1973), this Court held that the plaintiffs had standing "despite the fact that the record d[id] not disclose that any one of them ha[d] been prosecuted, or threatened with prosecution." *Id.* at 188. It was sufficient that the plaintiff was the "one against whom *these criminal statutes* operate." *Id.* (emphasis added). The plaintiff had the requisite intent and the challenged statute proscribed the conduct flowing from that intent. *Doe*, however, was not even a First Amendment case. The

discrete injury arising from the self-censoring effect of a statute abridging First Amendment rights exists *a fortiori* in such cases.

In *Babbitt v. United Farmworkers National Union*, 442 U.S. 289, 301, 302 (1979), the plaintiffs had standing to lodge a pre-enforcement challenge on First Amendment grounds because three simple predicates were met: (1) the plaintiffs "alleged in their complaint an intention to engage in the [proscribed activity]"; (2) the statute "on its face proscrib[ed] [such activity]"; and (3) the "State ha[d] not disavowed any intention of invoking the [statute's] criminal penalty provision." Consequently, the plaintiffs were "not without some reason in fearing prosecution." *Id.* at 301, 302. This formulation has become the bellwether in pre-enforcement facial challenges on First Amendment grounds.

Similarly, in *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), plaintiffs had standing to challenge a statute on First Amendment grounds in the absence of any evidence of actual or threatened prosecution because the "*law* is aimed directly at the plaintiffs, who, if their interpretation of the statute is correct, will have to take significant costly compliance measures or risk criminal prosecution." *Id.* at 392 (emphasis added). In addition, echoing *Babbitt*, this Court observed that the "State has not suggested that the newly enacted law will not be enforced, and [the Court] saw no reason to assume otherwise." *Id.* at 393. Because the injury arose from the statute, this Court held that the "alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.* at 393.

Even though the State in *American Booksellers*, as here, took a litigation position that the statute's coverage was much narrower than that alleged by the plaintiffs, this did not enter into the standing determination. Nor was it relevant on the merits because the litigation position was unenforceable. *Id.* at 395 ("as the [Virginia] Attorney General does not bind state courts or local law enforcement authorities, [this Court

was] unable to accept her interpretation of the law as authoritative"); *see also Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 622 n.6 (1976) (rejecting Chief of Police's narrowing construction of ordinance to avoid vagueness challenge because "it does not purport to be binding on enforcement authorities.").

The circuit courts of appeal have been even more explicit that where a plaintiff alleges an intention to engage in statutorily proscribed activity, a statute's existence causes injury, especially when the First Amendment is implicated. In *International Society of Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979), "no one ha[d] ever been charged with enforcing the [challenged] ordinance" and plaintiffs "ha[d] not yet engaged in any conduct punished or otherwise proscribed by the ordinance."

This was without consequence. The only matter the court focused on to determine whether there was an Article III controversy before it was the "plaintiff's interest in 'engag[ing] in a course of conduct, arguably affected with a constitutional interest, but *proscribed by a statute*.'" *Id.* at 819 (quoting *Babbitt*, 442 U.S. at 298) (emphasis added).

In *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987), the attorney general alleged that he "played no part in [the plaintiff's] arrest, did not threaten [the plaintiff] with enforcement of the statute, and allegedly did not intend to enforce the statute against [the plaintiff]." Nonetheless, the court found two injuries: "not only the threat of future prosecution, but an ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights." The court then restated the "legal principle underlying" this Court's standing jurisprudence: a "controversy exists not because the state official is himself a source of injury, but because the official represents the state whose *statute is the source of injury*." *Id.* at 947 (emphasis added).

The court summed up its standing determination by concluding that a "plaintiff challenging the constitutionality

of a state statute has a sufficiently adverse legal interest to a state enforcement officer sued in his representative capacity when, as here, the plaintiff shows an appreciable threat of injury *flowing directly from the statute*." *Id.*

In *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989), the defendant's arguments were similar to those raised in the present case. Relying on *Poe v. Ullman*, 367 U.S. 497 (1961), where this Court held that a challenge to ban on contraceptives was not justiciable because it had not been enforced in 75 years, the state contended that the plaintiffs did not have standing to challenge various portions of California's Elections Code because the provisions at issue "ha[d] never been enforced." *Eu*, 826 F.2d at 821.

The court, however, looked at the "aftermath of *Poe*," which teaches that those charged with enforcement can and do change enforcement policy. *Id.* at 836 n.15. In addition, the court observed that "in light of the plain statutory language . . ., the apparent disavowal of any intention to enforce these laws is 'anomalous.'" *Id.* at n.16 (citation omitted). Here, again, the statute is the source of the injury, not a record of enforcement nor even a litigation position consistent with such a record.

The Eighth Circuit walks in step. In *United Food and Commercial Workers International Union, AFL-CIO, CLC*, 857 F.2d 422 (8th Cir. 1988), the court found the challenged statute to be the source of injury:

> "[W]here the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may be properly maintained, whether or not the public officer has "threatened" suit; *the presence of the statute is threat enough*," at least where the challenged statute is not moribund." [*Id.* at 428 (citation omitted) (emphasis added).]

This was true notwithstanding affidavits submitted that the defendants did not presently intend to enforce the statute at issue. Again, people change their minds:

> "[P]resent intentions may not be carried out," and "it is not certain that changes in leadership or philosophy might not result in reinstitution of the [challenged] policy." . . . Because defendants . . . are "free to return to [their] old ways," the public interest in having the legality of the statutes settled prevents a finding of nonjusticiability in this case." [*Id.* at 430 (alterations in original).]

This possibility of an enforcement officials' change of mind also loomed in *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), where the FEC had promulgated a rule that restricted the plaintiffs' ability to solicit political contributions from its members. The plaintiffs ceased making such communications with their members and sought an advisory opinion from the FEC, which the commission voted not to issue. Plaintiffs then brought a pre-enforcement challenge to the rule.

The FEC contended that the plaintiffs did not have Article III standing because the Commission had voted not to issue an advisory opinion to the plaintiffs regarding whether the contested rule applied to them, such a vote also being necessary to commence an enforcement action. The court of appeals rejected this argument, holding that "[n]othing . . . prevents the Commission from enforcing its rule, at any time with, perhaps, another change of mind of one of the Commissioners." *Id.* at 603.

Moreover, because the plaintiffs had been "*arguably* chilled" from making the communications prohibited by the administrative rule, they had suffered a discrete injury and had standing on this ground to bring a First Amendment-based pre-enforcement challenge. *Id.* at 603-04 (emphasis

added). Again, the arguable effect of the *statute* is the source of the injury so long the *possibility* of enforcement remains. *Id.* at 603-604.

In *New Hampshire Right To Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996), the court distilled standing case law and found two grounds for standing: (1) the threat that the challenged statute will be enforced, and (2) self-censorship of speech in order to avoid prosecution. *Id.* at 13.

Based upon the plaintiff's record of having made, and intending to make, expenditures that "at least arguably fall with the statutory definition" challenged in *Gardner*, both grounds were present as it was highly probable that at some point the plaintiff would either be in violation of the statute or be forced to self-censor for fear of the consequences. *Id.* at 16 (emphasis added).

The defendants did nothing to rebut this likelihood. Before suit was filed one defendant stated that the statute would be enforced and another defendant refused to disclaim the possibility of enforcement and defended the statute's constitutionality. *Id.* at 16-17. Consequently, there was "more than enough in the record" to confer standing. Again, as in *Chamber of Commerce*, the injury, whether the actual threat of enforcement or the plaintiff's self-censorship, flows from the challenged statute.

There is no question in this case that petitioners' § 1983 suit was the catalyst behind the legislative amendments mooting the appeal of several claims in the Sixth Circuit. In determining, however, that petitioners did not benefit from the Kentucky legislature's amendments to the statutes at issue, without referring to the statutory language challenged and its arguable affect on petitioners' intended conduct, the Sixth Circuit departed from the standing jurisprudence of this Court and several circuits.

In the Sixth Circuit, dispositive standing considerations include whether the government has taken a self-serving litigation position concerning the reach of

challenged statutes, as well as other irrelevant factors, such as a plaintiff's litigation position regarding the court of appeals' appellate jurisdiction, and a plaintiff's decision to forgo administrative remedies, apparently considered on an *ad hoc* basis. If this type of reasoning is allowed to stand, "effective access to the judicial process" for civil rights plaintiffs, the reason for § 1988's enactment, *Hensley*, 461 U.S. at 430, will inevitably wane.

IV. The Sixth Circuit departed from the decisions of this Court and other circuits holding that when a plaintiff alleges an intent to engage in First Amendment activity, which a challenged statute proscribes, a credible threat of prosecution is assumed absent compelling contrary evidence.

Even if a plaintiff can show that the statute is the source of his injury by alleging an intent to engage in conduct proscribed by the statute, the threat of prosecution does bear on the standing determination, but only in the most attenuated sense when First Amendment rights are at stake. Quoting *Doe*, 410 U.S. at 188, this Court stated in *Babbitt* that "[w]hen the plaintiff ha[s] alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" 442 U.S. at 298.

This "credible threat of prosecution" standard, however, "is quite forgiving." *Gardner*, 99 F.3d at 14. The plaintiffs in *Babbitt* had standing to lodge a pre-enforcement challenge on First Amendment grounds because they had "alleged in their complaint an intent to engage in the [statutorily proscribed activity]" and the statute "on its face proscribe[d such activity]." *Id.* at 301-02. Consequently, the plaintiffs were "not without some reason in fearing prosecution." *Id.* at 302.

While the Court also observed that the "State had not disavowed any intention of invoking" criminal prosecution under the contested statute, in light of *American Booksellers*, 484 U.S. at 395, this consideration must be read to mean that only an authoritative or binding policy (such as an administrative rule or a formal Attorney General's opinion that fetters executive branch discretion[2]) against enforcement can bear on the presumed threat of prosection. *American Booksellers presumed* a threat of prosecution merely because of the "law['s] . . . aim[]" and the fact that Virginia had not provided an authoritative policy against enforcement according of the statute at issue. *Id.* at 392, 395.

The First Circuit in *Gardner* considered *Doe*, *Babbitt*, *American Booksellers* and other circuit decisions and distilled a bright line rule for standing in First Amendment anticipatory challenges to statutes:

> The preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence. [99 F.3d at 15.]

The Fifth Circuit in *Eaves* proceeded on this assumption when it determined whether there was an Article III controversy before it. The court focused on the

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[2] *See, e.g.*, *Cox v. D'Addario*, 570 N.W.2d 284, 291 (Mich. App. 1997) ("[A]n opinion of the Attorney General is binding on state agencies and officers . . . ."); *but see York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. 1991) ("The government officials are expected to abide by the opinion until a court decrees otherwise or the legislature changes the law. An attorney general's opinion is highly persuasive, but not binding on the recipient.").

"plaintiff's interest in 'engag[ing] in a course of conduct, arguably affected with a constitutional interest, but *proscribed by a statute*.'" 601 F.2d at 819 (quoting *Babbitt*, 442 U.S. at 298) (emphasis added).

Likewise, in *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995), the court, citing *Babbitt*, recognized that in First Amendment cases it need find only a "'[r]easonable predictability of enforcement or threats of enforcement, without more." *Id.* at 1499-1500.

Such predictability was found, though there was "no affirmative evidence that prosecution for violating the [contested] statute [wa]s imminent," because "New Mexico ha[d] not affirmatively disavowed any intention of bringing criminal prosecution against [the plaintiff]." *Id.* at 1502. Notably, the court held that a litigation position disavowal would have been disregarded. *Id.* at 1505 n.2 ("[E]ven if such representations had been made, it is unlikely they would [have] alter[ed] [the court's] conclusion.").

Eu presumed a threat of prosecution, notwithstanding lack of enforcement under the statute. The Ninth Circuit found *Babbitt* controlling, wherein the statutes proscribed the plaintiffs' alleged course of conduct, and the statutes had not been "'commonly and notoriously violated,'" 826 F.2d at 822, *i.e.*, they were not moribund.

The same was true in *Chamber of Commerce*. In addition to finding a threat of enforcement based, in part, on the possibility that the FEC could change their enforcement policy, the D.C. Circuit found standing because First Amendment rights were at stake and "*arguabl*[*e*] chill[]" caused by the contested rule was an independent basis for the court's jurisdiction. 69 F.3d at 603 (emphasis added).

Citing *American Booksellers*, *Gardner* and *Gonzales*, the Seventh Circuit in *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679 (7th Cir. 1998) found standing because the plaintiff "properly alleged its intention to engage in conduct proscribed by the

[challenged statute]." The threat of prosecution was presumed:

> [P]laintiff also made the necessary threshold showing of a credible threat of prosecution for its (present and/or future) violation of the Act. The Supreme Court has instructed us that a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute. *Id.* at 687 (emphasis in original).[3]

Finally, the Fourth Circuit in *North Carolina Right To Life, Inc. v. Bartlett*, 1999 WL 74739 (4th Cir. Feb. 17, 1999), again, confirmed that a litigation position will not rebut a credible threat of prosecution. As in the present case, the State argued that it had never interpreted the challenged statutes, nor did it intend to, according to their plain terms. *Id.* at *3. Citing *Bolton*, *Stocker* and *Gardner*, the Fourth Circuit invoked the "presumption" of a "credible threat of prosecution" relied upon in those cases. *Id.* The court observed that the challenged statute "appears by its terms to apply to [the plaintiffs]," the plaintiff is chilled from engaging in protected activity, and the "State's litigation position--that it does not interpret [the challenged statutes] to encompass [protected speech] fails to alter our analysis." *Id.* at *3, 4.

The plaintiffs were "left . . . with nothing more than the State's promise" not to prosecute, *id.* at *4, which can be revoked at any time, deterring the exercise of political speech:

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[3] The other factors cited by the court, such as the government's investigation of the plaintiff, served to "*enhance* the credibility of [the plaintiff's] threat of prosecution." *Id.* (emphasis in original). Thus, they were not necessary predicates.

> [The plaintiffs'] First Amendment rights would exist only at the sufferance of the State Board of Elections. It has no guarantee that the Board might not tomorrow bring its interpretation more in line with the provision's plain language. Without such a guarantee, [the plaintiffs] will suffer from the reasonable fear that it can and will be prosecuted for [violating the challenged statutes], and its constitutionally protected speech will be chilled as a result. [*Id.*]

The Sixth Circuit's standing jurisprudence is consistent with only one other circuit, the Eleventh. In *Wilson v. State Bar of Georgia*, 132 F.3d 1422 (11th Cir. 1998), a credible threat of prosecution was not presumed.[4] Rather, while agreeing with the characterization that the standard is "'quite forgiving,'" *id.* at 1428 (quoting *Gardner*, 99 F.3d at 14), the court held that the threat was not present because, *inter alia*, "there was no evidence regarding specific threats" and the defendants has taken a litigation position against enforcement. *Id.* at 1428-29.

Obviously, in any of the aforementioned circuits but the Sixth and the Eleventh, petitioners would have had standing and, thus, would have benefited for purposes of § 1988 attorneys' fees from the Kentucky legislature's amendments to the challenged statutes in this case. Petitioners alleged an intention to engage in a course of conduct that was at least *arguably* proscribed by the challenged penal statutes and defendants had not disavowed an intent to enforce them. The State's litigation position that they had not enforced, and did not intend to enforce, the

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[4] This pre-enforcement case, perhaps, should not have been analyzed on First Amendment standing grounds because the rules challenged--measures imposed upon lawyers who employ disbarred attorneys that prevent the latter from engaging in the unauthorized practice of law--were obviously not aimed at First Amendment activity.

statutes at issue as their terms allow was no more than a self-serving, unreliable *post hoc* promise. Departing from well settled standing jurisprudence, the Sixth Circuit relies on irrelevant considerations that threaten to eviscerate access to the courts for civil rights plaintiffs.

A. A plaintiff's litigation position that the federal court retains jurisdiction to decide the constitutionality of former statutes after they have been amended is not compelling evidence that the presumed credible threat of prosecution did not exist.

The Sixth Circuit, in an apparent attempt to grasp for something that would rebut the presumed credible threat of prosecution, first, almost in passing, recounted that petitioners "continued their appeal of the district court's decision in the prior suit to this Court and later sought certiorari from the Supreme Court." App. 6. The Sixth Circuit considered this to be "inconsistent with the actions one would normally expect from a prevailing party." *Id.* This statement by the Sixth Circuit is factually incorrect. Petitioners did seek a writ of certiorari from this Court but did not question the court of appeals' conclusion that the legislative amendments mooted certain claims. App. 124-32.

In addition, petitioners "continu[ation] of [their] appeal" simply amounted to a litigation position taken that, under the "voluntary cessation" exception to the mootness doctrine, the federal court retains jurisdiction to provide declaratory relief with respect to the former statutes under challenge if the defendant is free to reinstate the allegedly invalid statutes after the case is dismissed. *See Northeastern Fla. Contractors v. Jacksonville*, 113 S. Ct. 2297, 2301 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Consequently, petitioners argued in their reply brief, after the legislative amendments, that "because

the State has stubbornly maintained that these provisions are constitutional, and the lower court has held them to be so, this Court should declare their former language unconstitutional to ensure the State does not change its mind again and reenact them." [App. 137.]

But even if petitioners raised this argument erroneously, *see Massachusetts v. Oaks*, 491 U.S. 576, 583 (1989), petitioners were not implying that their speech was presently chilled by the amended statutes. They were only relying on what appears to be a legitimate ground, *see* Erwin Chemerinsky, *Federal Jurisdiction*, § 2.5.4, at 137 (2d. ed. 1994) (stating that there is some difficulty reconciling the cases), for the court of appeals to retain jurisdiction to issue a declaratory judgment. Consequently, petitioners' litigation position is not compelling contrary evidence of a credible threat of prosecution.

B. An administrative agency's offer to issue an *ultra vires* advisory opinion to protect the plaintiff from future prosecution does not rebut a presumed credible threat of prosecution.

The court of appeals, also, found the State's post-filing offer to issue an advisory opinion to protect petitioners from future prosecution made the threat of prosecution incredible. App. 6-8. This is a departure from established civil rights law. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). Section 1983 actions "'exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*.'" *Felder v. Casey*, 487 U.S. 131, 148 (1988) (emphasis in original) (citation omitted). The decision not to pursue an *ultra vires*

advisory opinion (a form of administrative relief that a § 1983 plaintiff need not pursue), therefore, is irrelevant to a § 1983 plaintiff's standing.[5]

Moreover, even if the pursuit of such a remedy was obligatory before commencing a § 1983 claim, the advisory opinion remedy under Kentucky law would not remove the chill to speech. First, the Registry of Election Finance has up to 30 days to issue an opinion, but cannot issue one before a ten-day comment period has elapsed. Ky. Rev. Stat. Ann. § 121.135(1),(5)(a); App. 63, 65. In addition, an advisory opinion covers only the "specific transaction or activity by the person" making the request for an advisory opinion. § 121.135(1),(4)(a)(c); App. 63-65. No exceptions are permitted. § 121.135(3). App. 64. Consequently, persons who wishes to engage in statutorily proscribed, but constitutionally protected, speech must seek a dispensation from the state each time they wish to speak. This Court held in *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1976) that the plaintiffs were not required to invoke the Federal Election Campaign Act's advisory opinion mechanism, in part, because the FEC had a "'reasonable time'" to issue one and this potential delay would not assure the plaintiffs that their vagueness concerns with the statute at issue would be "remedied prior to the chilling of political discussion." Likewise, here, requiring a political speaker to wait a minimum of 10 days and up to 30 days each and every time they wish to speak in a manner that is prohibited or regulated

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[5] The Registry is without authority to issue an advisory opinion with respect to Chapter 121A. § 121.135(1). App. 60. No exceptions. § 121.135(3); App. 61. The court of appeals recognized, but discounted, this problem by attempting to authoritatively extend the reach of advisory opinions issued under Chapter 121 so as to cover Chapter 121A. App. 7. In so doing, the court of appeals apparently forgot that "only state courts may authoritatively construe state statutes." *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1600 (1996). "'[Federal courts] lack jurisdiction authoritatively to construe state legislation.'" *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

by the clear statutory language at issue would not remove the statute's chilling effect prior to engaging in protected speech.

The court of appeals did not believe that petitioners were "unduly burdened by being required to request an advisory opinion each time they desire to engage in activity of questionable legality." App. 7. However, having to seek a dispensation from state officials *before* engaging in protected political speech effectively amounts to a system of unconstitutional prior restraints. Given the clear statutory language at issue, the Registry of Elections would have the discretion each time a request for an advisory opinion is received to apply the statutes according to their plain terms or effectively rewrite them so as to avoid constitutional infirmities. This is an evil not tolerated by the First Amendment. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) ("[A] scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint" and "will not be tolerated.").

This Court has recognized that the legal service marketplace is inadequate to address civil rights grievances:

> [V]ictims [of civil rights violations] ordinarily cannot afford to purchase legal services at the rates set by the private market. Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries. [*City of Riverside v. Rivera*, 477 U.S. 561, 576-77 (1986).]

This economic deterrent is even more pronounced in cases like this where the relief requested is limited to declaratory and injunctive relief.

Section 1988's remedy to this problem, however, is not so much to enable redress of wrongs to individuals but to benefit the public in intangible terms:

> Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above a civil rights remedy to a particular plaintiff."
>
> * * *
>
> Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.'" "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizens, suffers." [*Id.* at 574, 575 (citations omitted).]

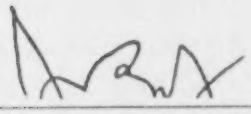
In this same light, this Court has observed that section 1988 is, also, a tool to coerce the States into complying with civil rights law. *See Evans v. Jeff D.*, 475 U.S. 717, 731 (1986) ("Congress enacted the fee-shifting provision as 'an integral part of the remedies necessary to obtain' compliance with civil rights laws, to further the same general purpose--promotion of respect for civil rights--that led it to provide damages and injunctive relief.") (citation omitted).

Left to stand, the Sixth Circuit's departure from established standing jurisprudence will disable victims of constitutional violations from being able to seek redress. It will, also, encourage the states to deter its citizens from engaging in protected political speech through facially overbroad statutes. The states need only take a litigation position that the words of the challenged statutes do not mean what they say: "Don't worry, just trust us" will be the prevailing mantra.

CONCLUSION

In concluding that petitioners did not benefit from (even though they provoked) the legislative amendments mooting their claims, the court of appeals departed from the precedents of this Court and several other circuits, which hold that an Article III injury arises from the existence of a statute proscribing First Amendment activity by the class to which the plaintiff belongs and if there is a credible threat of prosecution. Under such circumstances, a threat is presumed in the absence of compelling contrary evidence. Such evidence does not include a party's litigation position regarding the likelihood of enforcement or the jurisdiction of the court, or the decision to forbear an administrative remedy. The Sixth Circuit's deviation from established First Amendment standing jurisprudence threatens to undercut the ability of victims of civil rights injuries to seek redress, and to embolden the states to enact speech-inhibiting statutes. For the foregoing reasons, petitioners request this Court to grant them a petition for a writ of *certiorari*.

Respectfully submitted,



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